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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission	)	GC Docket No. 96-55

REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Notice of Inquiry and Notice of Proposed Rulemaking, FCC 96-109, released March 25, 1996 ("Notice"), and Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, AT&T Corp. ("AT&T") replies to other parties' comments on the Commission's examination of its current policies concerning the treatment of confidential information submitted to the Commission.[1]

A number of commenters, primarily incumbent local exchange carriers ("ILECs"), believe that the new competitive environment envisioned by the 1996 Telecommunications Act[2] requires a fundamental change in the way the Commission conducts various regulatory proceedings.

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[1] A list of commenters and the abbreviations used to identify them is attached as Appendix A.

[2] Pub. L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151, et seq. ("1996 Act").

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List A B C D E

SBC (at 2-7) contends that the Commission should no longer require ILECs to support tariff filings with cost data or, alternatively, it should end the presumption that such cost data will be made public unless the filing carrier can show that it will suffer significant competitive harm. SBC (at 14) even goes so far as to suggest that all discovery should be eliminated in the context of formal complaint proceedings so as to prevent the disclosure of confidential information, which (in its view) can never be adequately protected by a protective order. The Joint Parties (at 2) contend that Section 222(a) of the 1996 Act which imposes on all telecommunications carriers a duty to protect the confidentiality of proprietary information obtained from other carriers, equipment manufacturer and customers, and Section 222(b) which requires carriers not to use proprietary information obtained from another carrier for marketing their own services are somehow pertinent to the issue of confidential treatment in tariff filings and the other types of proceedings on which the Commission is focusing in this docket.

Preliminarily, AT&T does not oppose a substantial revamping of the tariff filing rules and those that govern other FCC proceedings for all carriers, including ILECs, when all carriers face substantial competition in the telecommunications markets that they serve. However, at this time, the ILECs face virtually no competition in their local exchange and access markets and thus modifying

existing rules in anticipation of the development of competition would be clearly inappropriate. Moreover, Section 222 of the 1996 Act has absolutely nothing to do with whether or not the Commission can and should require certain types of ILEC cost information to be placed on the public record in order to be able to determine whether the carrier's proposed offerings are just, reasonable and nondiscriminatory. Because the information that is typically required to be publicly filed is the carrier's own data and not information that a carrier may possess either about its customers, other carriers or manufacturers, the Joint Parties' discussion of Section 222 is inapposite.

Tariff Filings

The notion advanced by several parties that cost support should no longer be required for dominant carrier tariff filings should be summarily rejected. First, this is not the proper proceeding to address this issue because this docket concerns treatment of confidential information submitted to the Commission, not an overall examination of the support requirements associated with tariff filings. Second, CBT's contention (at 3) that "the new competitive environment has effected a fundamental change in the nature of tariff proceedings such that the public interest concerns that underlie the history of open tariff proceedings are now outweighed by the submitter's need to protect competitively sensitive information" is fanciful, at best.

As Time Warner (at 3) correctly notes, "[p]articularly during this critical period of transition to a competitive marketplace for local telecommunications services, the ability of interested parties . . . to analyze and prepare informed comments on proposed ILEC service arrangements is essential to ensuring effective regulatory review of the prices and other terms and conditions of access to ILEC facilities and services." As one commenter points out, "ILECs have a strong incentive to adopt pricing practices designed to artificially raise their competitors' costs of doing business." Id. at 4. Now more than ever, if interexchange carriers, competitive local exchange carriers, and competitive access providers are not provided full access to ILEC tariff support cost data, their ability to scrutinize new offerings to ensure that the rates are not set at monopolistic levels or in whatever discriminatory manner ILECs may choose is critical.[3] As MCI (at i) points out, the Commission's rules as to confidential treatment must "assure that interested parties can participate meaningfully in proceedings that may affect their vital interests. . . . [E]specially information offered by

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[3] This was confirmed by the comments in CC Docket 94-1, filed December 11, 1995. See id. Ad Hoc at 8; AT&T at 22-26; CompTel at 26; MCI at 8, 10; Sprint at 14. Inadequate review of new offerings would only allow ILECs greater opportunity for anticompetitive conduct against their competitors. Id. ICG at 2-3; ITTA at 2-5; MFS at 3-4; Time Warner at 11-12.

dominant carriers to justify their proposed tariffs . . . must be offered on the public record, in the absence of compelling demonstrations that private interests will be compromised by the revelation of alleged competitively sensitive materials."

As a general proposition, there is no basis for the Joint Parties' assertion (at 8) that cost support data that ILECs are required to file as part of the tariff support for new service offerings is "quintessentially proprietary and competitively sensitive information." Rather, as GTE at 6) correctly recognizes, "LECs typically provide summary cost data in support of proposed prices for new services offered . . . within their serving areas. Such aggregated data should continue to be made available as part of the public record."[4] Not only is this information essential to effective tariff review, but "[p]arties whose businesses depend upon the outcome of review proceedings are often willing and able to engage in more thorough analyses of ILEC proposals than the regulators' limited time and

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[4] Nor (to the extent that these types of offerings are even permitted) should the Commission depart from requiring public record support for dominant carrier tariffs proposing alternative pricing plans, contract tariffs, and individual case basis offerings. Indeed, it is in these circumstances when the potential for anticompetitive, discriminatory behavior is most likely. See Comments, filed December 11, 1995, in CC Docket 94-1, by AT&T at 32; CompTel at 23-25, 30, 40; Frontier at 13; LDDS at 1-2; MCI at 14-15; NCTA at 25; Sprint at 4, 18-19; Time Warner at 16-18.

resources permit. Any denial of or restriction on interested parties' access to cost support data or other information that an ILEC provides to regulators in the course of their review obviously limits the interested parties' ability to contribute to the review proceedings."[5]

Accordingly, AT&T believes that where a party seeks to obtain a benefit from the Commission, such as tariff effectiveness, the public interest would be best served if supporting information is filed on the public record, subject to an exception if the applicant can show substantial competitive harm. AT&T further believes that where the information is required to obtain a benefit and the applicant cannot otherwise make the necessary showings required to demonstrate that its application meets the substantive criteria of the Commission's rules, then a party requesting the information on which the submitter seeks to rely has then made a "persuasive showing" for disclosure of the confidential information.[6] Even when information is

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[5] Time Warner at 3-4.

[6] As the Commission notes, its current policy under the Freedom of Information Act, 5 U.S.C. § 552, and the Trade Secrets Act, 18 U.S.C. § 1905, has been to allow disclosure of competitively sensitive information only upon a "persuasive showing" of the reasons favoring disclosure. Notice ¶ 12. Thus, even where a compelling public interest reason for disclosure exists, the Commission will only authorize release of confidential information if it is a necessary link to the resolution of a public interest issue. Notice ¶ 23. In particular, the Commission requires that "specific and concrete public benefits be reasonably anticipated before properly

(footnote continued on following page)

critical to resolution of a public interest issue, as the Commission recognizes, widespread disclosure under FOIA may outweigh its benefit, and the protective order approach allows limited disclosure for a specific purpose. Notice ¶ 26.

As MCI points out (at 8), however, "protective orders are no substitute for public disclosure in theory or practice. Where a proceeding requires publicly available information, such as cost support in connection with dominant carrier tariff filings, only prompt and unrestricted access to the materials submitted can fulfill the requirement." This is because both the Act and Commission rules limit the time to "challenge filed tariffs . . . and, accordingly, any delay resulting from the need first to enter agreements in order to obtain information will hamper the ability of tariff challengers to perform timely analyses and then prepare filings for submission to the Commission." Id. at 8 n.17; accord Time Warner at 7. The Commission should not adopt the Joint Parties' suggestion (at 13-14) that, in the interest of expediency, it "establish a nondisclosure policy for LECs willing to share cost support pursuant to a protective

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(footnote continued from previous page)

exempt information will be released on a discretionary basis." Notice ¶ 24.

agreement." Rather, it should retain the current position that tariff support will generally be publicly available.

Rulemakings

AT&T agrees with the Joint Parties (at 15-16) that "[r]ulemaking proceeding are inherently public, and it is not unreasonable for the Commission to expect that the vast majority of information it receives in rulemaking proceedings will be placed on the public record." Indeed, as MCI notes (at 9), "the use of protective orders in rulemaking proceedings (including tariff proceedings), which carry widespread public impact, would substantially interfere with the Commission's ability to obtain public comment and with the public's right to know the basis for Commission actions." Thus, the "Commission should indicate a strong preference against the use of protective orders in rulemaking and other proceedings likely to have a broad public impact." Id. at 10; accord Joint Parties at 16.

Formal Complaint Proceedings

SBC's proposition (at 13-14) that the Commission should eliminate discovery in formal complaint proceedings and transform them into summary dispositions should be rejected. SBC's assertion that adoption of this proposal would not deny any party the right to full adjudication of a controversy because the party has the option of filing a court complaint is wrong. First, many complaints initiated

before the courts are referred to the Commission under the primary jurisdiction doctrine to elicit the Commission's expertise on the facts and law, which often requires discovery before the Commission. Second, eliminating discovery in regulatory complaint proceedings would only transfer the treatment of confidential information problem to a different forum. As the Joint Parties (at 17) recognize, "[t]he use of protective orders and/or redaction, while not perfect, is superior to any absolute rule that would require a party to a complaint proceeding to either publicly disclose confidential commercial information or waive its claim or defense." And, as MCI (at 12) notes, "disclosure under a protective order may be appropriate, even for crucial information in formal complaint proceedings when the impact will be felt primarily by the parties." In short, in complaint proceedings, the use of protective orders should guard against broadscale, inappropriate disclosure of proprietary business data, and yet allow litigants and the Commission to rely on the material to litigate and dispose of the matter.

Administrative Matters

AT&T does not believe that it is necessary for the Commission to specify more explicitly the types of information that should be submitted in support of a request for confidential treatment. AT&T agrees with other commenters that it would be appropriate, however, for the

Commission to make express its current practice of deferring action on requests for confidentiality until there is a request for the information.[7] This procedure conserves administrative resources and furthers efficiency because, in many instances, no one will ask for disclosure of the information for which confidential treatment has been requested. When and if a disclosure request is made, the Commission should give the submitter an opportunity to substantiate its request for confidentiality, including the substantial harmful effects to the business' competitive position.

Respectfully submitted,

AT&T CORP.

By _____

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July 15, 1996

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[7] See, e.g., CBT at 7; GTE at 8; Joint Parties at 27.

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GC Docket 96-55

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CERTIFICATE OF SERVICE

I, Ann Abrahamson, do hereby certify that a true copy of the foregoing Reply Comments of AT&T Corp. was served this 15th day of July, 1996, by United States mail, first class, postage prepaid, upon the parties listed on the attached Service List.

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